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IN THE

Supreme Court of the United States

October Term, 1950.

No. 518

The Montana Power Company, a corporation,
Petitioner,

v.

Federal Power Commission,
Respondent.

On Petition For a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

PETITION FOR REHEARING

Petitioner, The Montana Power Company, prays that this Court grant rehearing of its order of March 12, 1951, denying the petition for writ of certiorari, and that a writ of certiorari issue to review the judgment of the Court of Appeals for the District of Columbia Circuit, as prayed for in the petition filed January 26, 1951.

Reasons for Granting Rehearing and Issuing the Writ

1. The Commission's order, which was affirmed by the Court below, is not supported by and in accordance with the reliable, probative and substantial evidence as required by Section 7(c) of the Administrative Procedure Act[1] which provides that no sanction shall be imposed or rule or order issued unless so supported.

Section 2(f)[2] defines "sanction" as including the requirement to take a license.

That Act is applicable (*National Labor Relations Board v. The Pittsburgh Steamship Company*, No. 42, decided February 26, 1951, 19 LW 4136).

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[1] (c) EVIDENCE.—Except as statutes otherwise provide, the proponent of a rule or order shall have the burden of proof. Any oral or documentary evidence may be received, but every agency shall as a matter of policy provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence and *no sanction shall be imposed or rule or order be issued except upon consideration of the whole record or such portions thereof as may be cited by any party and as supported by and in accordance with the reliable, probative, and substantial evidence.* Every party shall have the right to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. In rule making or determining claims for money or benefits or applications for initial licenses any agency may, where the interest of any party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form. (Emphasis supplied.) (60 Stat. 241, 5 U.S.C. 1006(c).)

[2] (f) SANCTION AND RELIEF.—"Sanction" includes the whole or part of any agency * * * (6) requirement, revocation, or suspension of a license; * * *. (60 Stat. 238, 5 U.S.C. 1001(f).)

The *Pittsburgh* case and *Universal Camera Corporation* v. *National Labor Relations Board*, No. 40, also decided February 26, 1951, 19 LW 4160, establish the law to be that the evidence supporting a finding of the Federal Power Commission must be substantial when viewed on the record as a whole.

It is true, as this Court points out in the *Universal Camera* case, that when a Court of Appeals properly applies that principle, the power of this Court to review the correctness of the application of the standard announced "ought seldom to be called into action" (19 LW 4164).

The *Pittsburgh* and *Universal Camera* decisions were rendered after the decision of the court below in this case, and it is clear from the record that the court below did not apply the requisite standards in reviewing the findings of the Federal Power Commission. For example, in regard to the transportation of miners returning to the "States" from around Helena, the Commission stated:

> Though *no description of these specific boats is available*, it seems certain that they were manually-powered and *probably* were large, sharp-ended bateaux. *Nor does the record fix* the beginning and ending of this particular use of the River. *Probably* it started soon after the 1864 discovery of gold at Helena. *Chances are* it diminished soon after 1868 when most of the gold had been extracted, and ceased around 1870 when the placers were exhausted. (Emphasis supplied) (R. 67.)

This language demonstrates beyond question that the finding of the Commission is based upon conjecture and surmise and not upon substantial evidence. The Brief in Opposition does not question the Company's analysis of the evidence on that subject at page 14 of the petition nor does it suggest any other evidence which might support the finding.

Nevertheless the court below affirmed the Commission's finding, stating:

> The only reported use of the entire length of the up-

> per river for through traffic from above the falls to Fort Benton below occurred from 1864 to 1870. During that period, gold miners in considerable number traveled downstream with the aid of a portage or "land carriage" around the falls. (R. 1671.)

The finding of the Commission is the type of finding condemned by this Court in the following language from the *Universal Camera* case:

> Accordingly, it (the evidence) "must do more than create a suspicion of the existence of the fact to be established . . . . it must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury." *Labor Board* v. *Columbia Enameling & Stamping Co.*, 306 U.S. 292, 300.

The court below states that this is the only reported use for through traffic from above the falls to Fort Benton. Obviously this finding was of determinative effect in the court's holding that, on the basis of actual use, the river from Fort Benton to Three Forks is "navigable waters" under Section 3(8).

The determination that a stream constitutes "navigable waters" is a question of law, not a question of fact (*U.S.* v. *Appalachian Electric Power Company*, 311 U.S. 377, 404 and 405). That legal conclusion in the present case is based upon findings of fact which are not supported by substantial evidence and which have not been reviewed by the court below in accordance with the standards so recently announced by this Court in the *Pittsburgh* and *Universal Camera* cases.

The federal law, established by an unbroken line of decisions by this Court, is that a river to be navigable in law must be navigable in fact (Pet. p. 23). Congress adhered to this rule in defining "navigable waters" in Section 3(8) of the Federal Power Act (Pet. p. 20). Nevertheless, the Commission has construed this Section so as to make "navigable waters" a reach which is absolutely impassable in fact and not susceptible

improvement (Pet. Reply Br. p. 2). The Court below of cepted the legal conclusion of the Commission.

ac The Company has not been afforded the judicial review the Commission's decision to which it is entitled under the of Administrative Procedure Act. This Court should, therefore, Ac elf review the record to determine whether the findings its supported by substantial evidence and whether the con- are sions of law are correct.

clu 2. There is virtually no possibility of a conflicting de- cisi on on "navigable waters" in any other circuit. In this respect the case at bar presents an even more compelling gro und for rehearing than was presented in *Schriber-Schroth Co. v. Cleveland Trust Co.*, 305 U.S. 47, referred to in Rule 33(2) of this Court, in which case rehearing of an order der ying certiorari was granted because the concentration of the automobile industry in the Sixth Circuit was such that liti gation elsewhere with a resulting conflict of decisions was im probable.

The question here, so far as "navigable waters" is con- cer ned, is whether the reach in question constitutes such wa ters within the meaning of Section 3(8) (Pet., pp. 2-4, Bri ef in Opposition, p. 2).

A conflict in another circuit as to "navigable waters" cou ld arise only in a case—

(1) Under Section 3(8);

(2) Where an extended non-navigable and unimprovable reach, like the falls section in this case, lies between a once navigable reach below and a short reach above used briefly for limited light-draft, local traffic;

(3) Where the river crosses the state line below the non-navigable and unimprovable reach;

(4) Where the dam or dams in question are located in or above the non-navigable reach; and

(5) Where the dam or dams in question were constructed prior to 1935.

It cannot be too strongly emphasized that the absence of

a direct conflict in the courts is due to the uniqueness of the fact situation as to the reach in question. No previous case has presented either of the fundamental questions on navigability in this case, namely:

(a) Whether a reach almost 50 miles long and over 500 miles above the nearest state line, actually impassable and unimprovable throughout its entire length (and conceded so to be by the Commission throughout the upper 17 miles) which reach lies immediately above the historic head of extensive early day navigation, can be held to constitute merely an "interruption" within the meaning of section 3(8), where there is no evidence of use on or around it except the scant and doubtful evidence detailed on pages 12 to 14 of the petition, and

(b) Whether the 50 mile reach and a short reach above it, all above the historic head of navigation, can be included in "navigable waters" where there is no evidence of use for the transportation of persons or property in interstate commerce with the possible exception referred to under question (a) above.

The correctness of the Company's analysis of that use and of the intention of Congress in adopting section 3(8) (Pet. p. 20) is not questioned.

The importance of the decision in this case is underscored, if such emphasis be needed, by the decision of the supreme court of Indiana in *State* v. *Kivett*, 95 N.E. 2d 145 (Nov. 14, 1950) where that court held that in determining ownership of the bed of a stream the question of navigability is to be decided on the basis of federal decisions.

The possibility of a conflict is much more remote than the possibility of a conflict in the *Schriber* case. The reasons for granting a rehearing in the instant case are more cogent than in the *Schriber* case.

3. The Final Power Permit covering Government lands at Hebgen, granted in 1914, constituted a contract between

the United States and the Permittee. The Court below held that the Permit was acquired by the Company (R. 1675).

Under the contract the Permittee acquired a vested right to occupy the lands covered by the Permit until 1964, unless the Permit was sooner revoked by the Secretary (R. 1101).

The Permit provides that no revocation will be made "until after due notice has been served upon the Permittee, and until after the Permittee shall have been given a reasonable time, not to exceed ninety (90) days after the service of said notice, within which to show cause why such revocation should not be made" (R. 1101).

No such notice has ever been given. The Secretary of Agriculture, who concededly retains jurisdiction over the Permit, has accepted and recognized the Company as the Permittee. He has also specifically determined that permits shall, under the circumstances of this Permit, remain in effect. Exhibit 169 (R. 1012) is an excerpt from the Forest Service Manual, as amended in 1946. As to permits under the Act of February 15, 1901, it provides that even if by sale, reorganization or other action the permittee has lost all financial interest in the project structures and in the Permit itself, nevertheless, if the authorized project works have been constructed and all the conditions of the Permit are being met, the Permit may be allowed to remain in effect (R. 1613).

The Permit does not provide that a transfer shall terminate it. Neither is it a mere personal privilege which would be destroyed by transfer (*Swendig* vs. *Washington Water Power Co.*, 265 U.S. 322, 329-330).

The provision with respect to transfer is *at most* a condition subsequent. As such, it would constitute *at most* a ground for declaring a forfeiture. In the absence of a specific declaration of forfeiture, the Company's rights cannot be terminated (*Schulenberg* vs. *Harriman*, 88 U.S. 44, 63; *Bybee* vs. *Oregon and California Railway Company*, 139 U.S. 663,

679; *Spokane and British Columbia Railway Company* vs. *Washington and Great Northern Railway Company*, 219 U. S. 166, 175). The Secretary of Agriculture could not revoke the Permit, except in accordance with its terms (*Noble* vs. *Union River Logging Railroad*, 147 U.S. 165). To permit the Federal Power Commission to do so, in effect, would impair the obligation of the contract. The Federal Power Act does not give the Commission power over permits issued prior to 1920; rather, it specifically preserves such permits and leaves the jurisdiction of the Secretaries over them unchanged.

The Company has acquired the Permit (R. 1675). No action has been taken to forfeit or terminate it. If the decision below is permitted to stand, the Company will be deprived of its vested property right under the contract without due process of law.

Conclusion

For the reasons set forth above and in the Petition for Writ of Certiorari, it is respectfully urged that rehearing be granted, and that upon such rehearing a Writ of Certiorari issue to the Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,

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March 26, 1951.

CERTIFICATE OF COUNSEL

I hereby certify that the foregoing Petition for Rehearing is presented in good faith and not for delay, and is restricted to grounds specified in Rule 33 of the rules of this Court.

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